IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

TUESDAY, THE 27TH NOVEMBER 2007 / 6TH AGRAHAYANA 1929

WP(C).No. 1746 of 2007(G)

PETITIONER:

A. BASHEER (P.A.BASHEER),
S/O. ABDUL KHADER, PALLATH HOUSE, THRIPPALUR,
PUTHIYANKAM P.O., ALATHUR, PALAKKAD.

BY ADV. SRI.SAJAN VARGHEESE K.
SRI.LIJU. M.P

RESPONDENTS:

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1. ABDUL NAZAR, S/O. LATE MUHAMMED,
PALLATH HOUSE, THRIPPALUR, PUTHIYANKAM P.O.,
ALATHUR, PALAKKAD DISTRICT.

2. ALATHUR GRAMA PANCHAYAT,
ALATHUR, PALAKKAD DISTRICT, REPRESENTED BY
SECRETARY.

3. MUHAMMED IBRAHIM, S/O.KHADER RAWTHER,
PALLATHU HOUSE, THRIPPALUR, PUTHIYANKAM P.O.,
ALATHUR, PALAKKAD DISTRICT.

4. THE TRIBUNAL FOR LOCAL SELF GOVERNMENT
INSTITUTIONS, THIRUVANANTHAPURAM.

R1 BY ADV. SRI.T.M.CHANDRAN
SRI.V.A.SASIDHARAN
R2 BY SRI.P.N.KRISHNANKUTTY ACHAN(SR.)
SRI.K.MOHANAKANNAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 16.7.2007, THE COURT ON 27/11/2007 DELIVERED THE FOLLOWING:

APPENDIX IN W.P.(C). NO.1746 OF 2007

PETITIONER'S EXHIBITS:

EXT.P1 TRUE COPY OF THE ORDER DATED 28.1.2006 PASSED BY THE SECOND RESPONDENT.

EXT.P2 TRUE COPY OF THE ORDER DATED 8.6.2006 PASSED BY THE 2ND RESPONDENT.

EXT.P3 TRUE COPY OF THE ORIGINAL PLAN.

EXT.P4 TRUE COPY OF THE APPROVED REVISED PLAN.

EXT.P5 TRUE COPY OF THE COMMISSION REPORT DATED 23.8.2006 SUBMITTED BEFORE THE FOURTH RESPONDENT.

EXT.P6 TRUE COPY OF THE OBJECTION SUBMITTED BY THE PETITIONER IN THE APPEALA PENDING BEFORE THE 2ND RESPONDENT.

EXT.P7 TRUE COPY OF THE OBJECTION SUBMITTED BY RESPONDENT NO.2.

EXT.P8 TRUE COPY OF THE ORDER DATED 30.9.2006 PASSED IN APPEAL NO.259/06 ON THE FILE OF THE RESPONDENT NO.4.

EXT.P9 TRUE COPY OF THE NO OBJECTION CERTIFICATE ISSUED BY THE THIRD RESPONDENT, THE OWNER IN POSSESSION OF THE SOUTHERN PROPERTY.

EXT.P10 TRUE COPY OF THE NOTICE ISSUED BY THE 2ND RESPONDENT TO THE PETITIONER.

EXT.P11 TRUE PHOTOGRAPH OF THE DISPUTED BUILDING.

EXT.P12 TRUE COPY OF THE COMMISSION REPORT DATED 8.1.2007 SUBMITTED IN OS NO.10/2005 ON THE FILE OF MUNSIFF'S COURT, ALATHUR.

EXT.P13 TRUE COPY OF THE POSTAL ACKNOWLEDGEMENT CARD SIGNED BY THE SECOND RESPONDENT.

EXT.P14 TRUE COPY OF THE MAHAZAR ALONG WITH THE REPORT.

EXT.P15 TRUE COPY OF PHOTOGRAPH SHOWING THE NORTHERN SIDE OF THE DISPUTED BUILDING.

RESPONDENTS' EXHIBITS:

EXT.R1(A) TRUE COPY OF THE PETITION DATED 29.11.04.

EXT.R1(B) TRUE COPY OF THE ORDER DATED 29.11.04 SIGNED BY THE SECRETARY.

EXT.R1(C) TRUE COPY OF THE PETITION DATED 14.12.2004.

EXT.R1(D) TRUE COPY OF THE JUDGMENT DATED 30.3.2006.

EXT.R1(E) TRUE COPY OF THE NO OBJECTION CERTIFICATE.

EXT.R1(F) TRUE COPY OF THE PHOTOGRAPH SHOWING THE SIDE PORTION OF THE BUILDING.

EXT.R1(G) TRUE COPY OF THE OBJECTION DATED 19.1.2007.

EXT.R2(A) TRUE COPY OF THE PROCEEDINGS OF THE PANCHAYATH DATED 12.12.06.

EXT.R2(B) TRUE COPY OF THE PROCEEDINGS OF THE PANCHAYATH DATED 15.1.2007.

// TRUE COPY//

PS TO JUDGE

K. M. JOSEPH, J.

W.P.C. NO. 1746 OF 2007 G

Dated this the 27th November, 2007

JUDGMENT

Petitioner has approached this Court challenging Exts.P8 and P10. He seeks a declaration that there is no violation of the Building Rules in the construction of the disputed building and a further direction not to initiate any coercive steps to see that any portion of the disputed building is demolished.

2. Case of the petitioner, in brief, is as follows:

Petitioner is in possession of 11-1/2 cents of land which has a width of 8.5 metres and length of 55.3 metres. He has traced title to his property to a partition deed between brothers of one Abdul Khader. Third respondent is holding the property on the southern side of the petitioner's property. He is stated to be a relative. The first respondent who is the son of paternal Uncle of the petitioner, is the owner of the property on the northern side. First respondent raised complaints to the second

respondent Panchayat stating that the construction being made by the petitioner is violative of the Building Rules. Later, pursuant to the direction of this Court, Ext.P1 order was passed. The matter was carried before the fourth respondent Tribunal which remanded the matter with certain directions. It is thereafter that by Ext.P2, it was found by the second respondent that there is no violation of the Building Rules. This is challenged before the Tribunal. Ext.P3 is the original Plan while Ext.P4 is the approved revised Plan. An Advocate Commissioner was deputed by the Tribunal irrespective of Exts.P3 and P4 Plans as well as the Mahazar prepared by the Panchayat Secretary with the assistance of the Assistant Engineer of the Panchayat and the Overseer. Ext.P5 is the Report of the Advocate Commissioner. Complaint is raised against the same. Petitioner and second respondent filed Exts.P6 and P7 objections respectively, it is stated. However, Ext.P8 order is passed by the Tribunal as per which it was

ordered to demolish the construction made by the petitioner. Ext.P9 is the No Objection Certificate issued by the third respondent, the owner in possession of the southern property. Ext.P10 is the notice issued by the second respondent directing the petitioner to demolish the building and to see that necessary open space to be provided on either side of the building. Petitioner challenges Exts.P8 and P10 and seeks a declaration that there is no violation of the Building Rules.

3. A Counter Affidavit is filed by the first respondent. It is stated, inter alia, as follows:

He was at Faridabad in connection with his employment at the beginning of the construction of the building and he came to Kerala only in the middle of 2004. He filed Ext.R1(a) petition. Ext.R1(b) order was passed by the Panchayat dated 29.11.2004 staying the illegal construction. Petitioner, however, continued and it revealed his disrespect to the orders. First respondent filed a Writ Petition seeking to enforce Ext.R1(b) order. But,

despite the interim order, petitioner continued construction with the concurrence of the Panchayat. First respondent sent Ext.R1 (c) to the Deputy Director of Panchayats. This Court disposed of the Writ Petition filed by the first respondent with a direction to the Panchayat to dispose of the matter. Ext.R1(d) is the Judgment of this Court in the Contempt of Court Case where the contempt was closed accepting the apology on condition that an amount of Rs.5,000/= was paid to the first respondent. It is stated that the petitioner has not filed any objection to Ext.P5 Commission Report and in Ext.P8 order itself it is stated that no objection was filed. Ext.R1(e) is produced as the no objection letter given by the petitioner to the southern property owner as the reward for Ext.P9 consent letter. Ext.R1(f) is produced as another photograph showing the northern side of the building. It is stated that the coconut trees seen there belong to the first respondent and on the southern side, a boundary stone is also seen. Among the three steps to the building of the first

respondent, one step is seen covered by putting mud by the petitioner. The window fixed earlier on that side is removed and closed the wall. But, now the window is again fixed on that side. The sun shade of the building of the petitioner is projected to the property of this respondent. Regarding the Commission Report in the Suit filed by the petitioner, it is stated to be filed after the writ petition was filed by the first respondent. Ext.R1 (g) is the objection to the Commission Report. It is stated that the petitioner has constructed the building having a total width of 8.08 metres in a total width of the property of 8.5. metres leaving 15 centimetres on the northern side and less than 25 centimetres from the stair case on the southern side. As per the approved plan, petitioner is entitled to construct the building only having a width of 6.28 metres.

4. In the Reply Affidavit filed, it is, inter alia, stated as follows:

Petitioner has not flouted the orders. He is employed in

the Gulf countries, but his income derived from there is meager. He is aged 36 and with his entire life achievement and with the assistance from several corners through loans and other ways, the petitioner could put up the disputed building, which is also a below average moderate model one. The measurement shown by the Panchayat Officials are correct and legal. It is again denied that there is no objection filed to Ext.P5 Report and it is stated that the averment in Ext.P8 might have occurred due to a mistake. Consent was obtained only by way of abundant caution. Ext.P15 is the photograph showing the northern side of the disputed building. Petitioner has not covered any step to the first respondent's residence by mud. The sun shade of the building never projected to the first respondent's property. Petitioner has put up the building only as permitted by law and thus, the width of the building would come only to that corresponding width after providing necessary open space on both sides.

5. In Ext.P8 order, the tribunal has found that on the basis of Ext.R1 approved plan, permission was for effecting construction by leaving an open space of one metre and 1.20 metres on the northern and southern sides respectively and the width of the building on the north - south direction was 6.28 metres. The width of the building plot, it is found in the north - south direction is 8.50 metres. It is stated that the Mahazar prepared by the Panchayat would show that the width of the petitioner's building in the north - south direction is 6.40 metres and open space of one metre is available on the northern side where the petitioner's property abuts the first respondent's property. Thereafter, it was found that the Commissioner has reported in Ext.C1 to which no objection was filed by anybody that the width of the building constructed by the petitioner herein is 7 metres and the open space available on the northern side at 3 points are 53 cms, 54 cms and 58 cms and on the south-western extremity is 94 cms and south-eastern extremity is 1.10 metres and that there are four windows on the northern wall of

the building and a stair case on the south-western side and its distance from the southern boundary is only 25 cms. The Tribunal proceed to accept the Commission Report. Thereafter, referring to Rule 24(5), it was found that it is not possible to construct a building in a width of 7 metres, leaving open space in a width of 1 and 1.20 metres on the northern and southern sides respectively on a property having a width of 8.5. metres in the north - south direction. It is thus found that the building of the petitioner is having a width of 7 metres and the statutory open space is not maintained. There is also reference to the proviso to Rule 24(11) of the Kerala Municipality Building Rules to find that the rejection of the first respondent's complaint is unsustainable. The Tribunal directed that action has to be taken under Section 235W of the Kerala Panchayat Raj Act to maintain open space of 1 and 1.20 metres on the northern and southern sides of the building and to maintain a distance of 60 cms to the boundary from the stair case on the south -

western side.

6. I heard the learned counsel for the petitioner, the first respondent and the second respondent Panchayat.

7. Learned counsel for the petitioner would contend that the impugned order is unsustainable. He would submit that objections were indeed filed as Exts.P6 and P7 and, therefore, the finding that there was no objection to Ext.P5 Commission Report, cannot be sustained. He also would contend that a perusal of Ext.P5 Commission Report would show that it cannot be acted upon. He points out that the Commission Report in the civil suit filed would clearly bring out the correctness of the petitioner's stand. He would submit that particularly, in a matter of this nature, there is no warrant for directing demolition and not accepting the Report of the Panchayat Officials. They have prepared a Mahazar. It is also pointed out that, at any rate, even assuming that there is some deviation, the deviation is only a minor and, therefore, it does not call for demolition. Learned counsel for petitioner relies on Ext.P9 in support of his

contention.

8. I have called for the records to ascertain whether it is true that the petitioner had in fact filed objection to Ext.P5 Commission Report. On a perusal of the records, it becomes clear that in fact the petitioner had not filed objection to Ext.P5 Commission Report and the statement in this regard in Ext.P8 is correct.

9. Per contra, learned counsel for the first respondent points out that the petitioner is not entitled to any relief. He reiterated the contentions with reference to the Counter Affidavit. He would also submit that this Court should not extend to the petitioner any help, having regard to his conduct in making a totally incorrect statement before this Court that he had filed objection to the Commission Report.

10. Learned counsel for the petitioner would submit that even if it is true that the statement made by petitioner that objection was filed to the Commission Report is found incorrect, in view of the consequences that follow Exts.P8 and P10,

the matter may, at any rate, be remitted back on the terms which are considered reasonable. However, this is opposed by Shri T.M. Chandran, learned counsel for the first respondent.

11. I would think that having regard to the repercussions and the impact, though the petitioner has not objected to the Commission Report, he should be given an opportunity to object to the Commission Report and a decision be taken within a time limit. But, necessarily, in view of the conduct of not having filed objections and yet contending that he had filed objection, petitioner must be mulcted with sufficient costs. In such circumstances, the Writ Petition is allowed and Exts.P8 and P10 are quashed on condition that the petitioner pays a sum of Rs.20,000/= (Rupees Twenty Thousand) as costs to the first respondent, which must be paid within three weeks from today to the counsel for the first respondent. In case the amount is so paid, petitioner is free to file his objections to the Commission Report before the fourth respondent Tribunal, within a period of three weeks from the date of payment of the costs and the

Tribunal will proceed to consider the matter, hear the parties and take a decision in accordance with law, within a period of two months from the date of receipt of a copy of this Judgment. It is made clear that if the petitioner availing the benefit of this Judgment, files objections and after consideration pursuant to this Judgment, it is found that the stair-case put up on the southern side is in violation of Rule 24(11), the Tribunal is not to draw any support from Ext.P9 consent. In case the costs is not paid within a period of three weeks from today as aforesaid and/or the petitioner does not file objection to the Commission Report within the period mentioned, the Writ Petition will stand dismissed.

K. M. JOSEPH, JUDGE

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